NORASHIKIN v. CHAMPION MOTORS (M) SDN. BHD.

[A.C.J. (Harun J.) July 6, 1971]

[Kuala Lumpur — Civil Appeal No. 17 of 1970]

Hire-purchase — Agreement to purchase motor-car — Hirer required to keep owners indemnified against all loss or damage including those occasioned by riot or civil commotion — Owners selected insurers and took out policy before execution of agreement — Failure to obtain cover against loss by riot — Car destroyed by fire during riot — Waiver.

Insurance — Motor-car under hire-purchase — Owners official insurers — Loss by riot excepted — Waiver — Whether owners protected by saving clause.

The appellant as hirer had entered into a hire-purchase agreement with the respondents as owners on purchase of a motor-car. The agreement required the hirer to keep the vehicle insured in the joint names of the owners and the hirer during the hiring. The respondents selected their official insurers who issued a policy containing the usual exception clauses against loss or damage occasioned by riot or civil commotion. The vehicle was totally destroyed by fire during a riot. The respondents claimed for breach of the hire-purchase agreement and obtained judgment against the hirer who appealed.

Held: allowing the appeal: the hire-purchase agreement clearly made it a condition that the appellant keep the respondents indemnified against all loss or damage to the vehicle from whatever cause arising, which included loss or damage occasioned by riot or civil commotion, but the respondents by selecting the insurers themselves and taking out the policy themselves before the execution of the hire-purchase agreement, which did not cover against loss or damage occasioned by riot or civil commotion, had waived this condition of the hire-purchase agreement. Therefore the "saving-clause" in the agreement could not be invoked.

Case referred to:-

(1) *Barrett Bros. (Taxis) Ltd.* v. *Davies* [1966] 1 W.L.R. 1334.

CIVIL APPEAL.

Raja Abdul Aziz Addruse for the appellant.

A. D. Rajah for the respondents.

Cur. Adv. Vult.

Harun J.: This is an appeal from the decision of the learned president of the sessions court, Kuala Lumpur ordering the appellant to pay the respondents the sum of $3,515.40 together with interest thereon at the rate of 6% per annum from the date of the order to date of realisation and costs for breach of a hire-purchase agreement.

The appellant, a typist, had entered into a hire-purchase agreement with the respondents, motor-car dealers, on December 27, 1967 in respect of a motor-car. On May 13, 1969, the said motor-car was totally destroyed by fire during a riot in front of the appellant's house.

The respondents' claim in the sessions court was that by virtue of clause 8 of the said hire-purchase agreement, the appellant, as hirer, will keep the respondents, as owners, indemnified against all loss or damage to the said motor-car from whatever cause arising. It will be convenient here to set out in full the said clause 8:

"8. The hirer will forthwith at his own expense insure and during the continuance of the hiring will keep the vehicle insured in the joint names of the owner and hirer against fire, theft, collision, loss or damage from whatever cause arising in the sum of dollars five thousand only ($5000) at least and against third party risks in some insurance office selected by the owners and will duly pay all sums of money necessary for effecting and keeping on foot such insurance and will deposit the policy or policies of such insurance and the receipts for all such sums of money as aforesaid with the owners on demand and will not do or suffer to be done any act or thing which might invalidate any such insurance and will keep the owners indemnified against all loss or damage to the vehicle from whatever cause arising and from all claims arising out of accident either to persons or vehicles caused by the vehicle or the driver thereof. If the hirer shall become the owner by purchase of the vehicle during the currency of any such policy the owners shall upon payment by the hirer to them of all moneys due under this agreement and with the consent of the said insurance office transfer the benefit of such policy to the hirer. If any breach of his obligations under this clause shall be made by the hirer the owners shall be at liberty during the hiring for their own benefit to effect or keep on foot any such insurance as aforesaid and to recover from the hirer any sum or sums paid by them for such purpose provided always that if the sum recovered by the owners under any insurance in this clause shall exceed the balance of the said sum of dollars six thousand three hundred & twenty five only ($6325) after deducting all sums previously paid by the hirer for hire and the amount paid on signing this agreement then such excess less any costs, charges and expenses payable by the hirer hereunder shall be paid by the owner to the hirer."

It will be observed that:

(a) The insurance was to be taken out *in the joint names* of owners and hirer;

(b) The insurance office was to be selected by the owners;

(c) The policy to be deposited with the owners;

(d) The insurance to be expressed for the benefit of the owners; and

(e) The owners were entitled to keep the insurance on foot and recover the expenses from the hirer.

In the event, the respondents on December 26, 1967 prior to the execution of the hire-purchase agreement selected their official insurers, the National Employers Mutual General Insurance Association Ltd. and policy No. KFM/2334/P for the period December 26, 1967 to December 25, 1968 was issued. On this policy is attached an endorsement dated February 1, 1968 to the effect that the respondents are the owners of the vehicle, that it is on hire-purchase to the appellant and that all moneys payable on the policy shall be payable to the respondents. This policy contained the usual exception clauses against loss or damage occasioned by riot or civil commotion.

On November 28, 1968 policy No. KFM/3305/P for the period December 26, 1968 to December 25, 1969 was issued by the same insurance company in respect of this motor-car. The second policy is identical with the first policy except that it is without the endorsement regarding claim of ownership by the respondents. As the hire-purchase agreement was then still subsisting, it may be inferred that this omission was due to an administrative oversight of the respondents. On the facts of this case, it is clear that all matters pertaining to and arising out of the hire-purchase agreement in respect of insurance were attended to by the respondents. The respondents are a very well-known firm of motor dealers and had done everything legally possible to protect their interests.

They knew fully well that the insurance policy contained the usual exception clauses against loss or damage by riot or civil commotion, but they were content with it. The truth of the matter is that this country had been at peace for so long that no one expected the tragic events of May 13 (1969) to happen and consequently the respondents were of the view that it was not necessary to pay increased premium to insure against risk of riot or civil commotion. At the appeal the respondents admitted that they did not want to cast unnecessary burden on hirers to pay the increased premium for such risks.

It is the appellant's contention that even before the breach there was waiver of clause 8 of the hire-purchase agreement and that the respondents by their conduct are estopped from insisting on their strict rights. The respondents on the other hand contend that there was no waiver of clause 8 and even if there was, they are protected by clause 16 of the hire-purchase agreement which provided:

"No waiver by the owners of any breach by the hirer of any of his obligations under this agreement shall operate as a waiver or notice of or consent to any subsequent breach. No time or other indulgence granted by the owners shall affect their strict rights under this agreement."

In *Barrett Bros. (Taxis) Ltd.* v. *Davies*,[1] Lord Denning M.R. said:

"The principle of waiver is simply this. If one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do."

On the facts, that is precisely the position here. The hire-purchase agreement clearly made it a condition that the appellant keep the respondents indemnified against all loss or damage to the vehicle from whatever cause arising, which includes loss or damage occasioned by riot or civil commotion but the respondents by selecting the insurers themselves and taking out the policy themselves before the execution of the hire-purchase agreement which did not cover against loss or damage occasioned by riot or civil commotion have clearly waived this condition of the hire-purchase agreement.

When the appellant took out the second policy from the same insurers on identical terms and conditions she was in fact acting on the belief that it was not necessary to insure against loss or damage occasioned by riot or civil commotion. On these grounds, I hold that the respondents by their conduct have waived the condition that the vehicle be insured against loss or damage occasioned by riot or civil commotion and therefore they cannot claim under clause 8.

There remains the question whether the respondents are now entitled to rely on clause 16 of the hire-purchase agreement. This clause is commonly known as a "saving clause" but such a clause does not mean that the owners can do no wrong or that their rights are protected no matter what the circumstances. In this case the circumstances were such that the owners themselves thought that it was not necessary to insure against loss or damage occasioned by riot or civil commotion. They took out the first policy themselves and therefore there was no breach by the hirer as contemplated by clause 16. Neither is there a subsequent breach since the second policy is identical with the first and issued by the same insurance office. There was in effect an agreement between the parties that the vehicle will not be insured against loss or damage occasioned by riot or civil commotion and therefore clause 16 will not apply. In all the circumstances of this case, I hold that there has been no breach of the hire-purchase agreement. For these reasons, I allow the appeal with costs.

Appeal allowed.

Solicitors: *Rithauddeen & Aziz; Lovelace & Hastings.*

ONG BOON SEONG v. SYED HUSSEIN ALATAS

[O.C.J. (Abdul Hamid J.) July 10, 1971]

[Kuala Lumpur — Civil Suit No. 471 of 1971]

Practice and Procedure — Injunction — Interlocutory injunction — Application to dissolve or set aside — Nature of — Whether right of property affected or threatened.

Societies — Proper party to bring action on behalf of — Societies Act, 1966, s. 9(c).

This was an application by the defendant for an order that the *ex parte* interlocutory injunction granted on June 29, 1971 be dissolved or set aside. It was ordered that the applicant/defendant be restrained and prohibited until final disposal of the suit from continuing to act as if he were chairman of the Party Gerakan Rakyat Malaysia or as a member of the party, from doing any thing to convene a meeting of the party, and from making statements as if he were chairman or member.

Held: (1) to entitle the plaintiff to an interlocutory injunction the court should be satisfied that there was a serious question to be tried at the hearing, and that on the facts before it there was a probability that the plaintiff was entitled to relief. The court would grant an interlocutory injunction to preserve property or prevent irreparable damage or to keep matters in *status quo* until trial, where the plaintiff made out a case on the merits, though there was a technical defence on which the defendant might succeed at the trial;

(2) in the present case, the plaintiff was not only a member of the Party Gerakan Rakyat but also a committee member. As a member he could not be said to have no interest whatever in the property of the party. He was entitled as a member to take legal action to prevent any non-member from making unauthorised use of party property;

(3) it could not be denied that as a member of the party, the plaintiff had the right to sue whilst it might be true that he sued in his own name, the fact remained that at all material times, he was holding the office of Deputy Secretary-General and a member of the Central Committee. The plaintiff was therefore competent to institute these proceedings;

(4) in view of the circumstances of this case, the court should not set aside the interlocutory injunction. The interim injunction was necessary to keep matters in *status quo* until the hearing of the suit.

Case referred to:-

(1) *Vethanayagam* v. *Karuppiah & Ors.* [1968] 1 M.L.J. 283 on appeal [1969] 1 M.L.J. 146.